# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 392

BILLY JOE TANT AND JOHN TED JENKINS, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 4, 1969. A petition for rehearing was denied on June 27, 1969. The petition for a writ of certiorari was filed on July 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the district court erred in declining to charge that a reasonable doubt may arise from a lack of evidence.



361-371—69

## STATEMENT

1. After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on three counts charging violation of the federal liquor laws. On October 15, 1968, petitioner Tant was sentenced to imprisonment for concurrent terms of three years; petitioner Jenkins received concurrent two-year terms, six months of which were to be served, with five years' probation. The court of appeals affirmed per curiam (Pet. App. A).

The evidence showed that on August 29, 1966, Alcohol and Tobacco Tax agents Frazier and Orsini hired Clarence Lee Shew as a special employee to assist in locating liquor law violators in the area of Atlanta, Georgia (R. 121).[1] The agents instructed Shew not to entice individuals into selling him liquor and not to offer more than the going rate (R. 99–100, 124). On the evening of September 6, Shew and agent Frazier met petitioner Tant at his service station in Cartersville, Georgia. Shew offered to buy fifteen cases (ninety gallons) of whiskey. Tant replied that he would not sell less than one hundred gallons at a time. Shew agreed to that minimum. Tant asked Jenkins, who was standing nearby, whether they had any liquor immediately available. Jenkins replied that they had about thirty gallons. Following a telephone call, Tant told Shew and Frazier that he had just sold the last of a 200-gallon supply, and directed them to call again

[1] Citations are to the "Transcript of Record," filed with the Clerk of this Court.

on September 9. Tant set the price at $4 per gallon (R. 19–21).[2]

On September 9, Frazier and Shew returned to the service station and placed an order for seventeen cases (102 gallons). Tant told them his new supply would not be ready for two days. He said that he would meet them on the morning of September 11 at a roadside picnic table located on Route 41 (R. 31). At the appointed time and place Tant and Jenkins met the agent and special employee. Tant drove their car away after telling them to wait ten minutes and then go with Jenkins (R. 32). After the short wait Jenkins drove them to a small dirt road nearby, where they met Tant. The agent's car was loaded with non-tax paid whiskey (R. 33). Tant was paid $408 in funds furnished by the government (R. 75).

On the evening of September 23, 1966, Shew and agent Orsini drove to Tant's service station to make another 102-gallon purchase. Tant and Jenkins led Orsini and Shew to a church in a nearby town. Tant then drove the agent's car away. He returned with the illicit liquor in less than a half-hour. Shew paid Tant $408 in government-furnished funds (Tr. 80–87). While there, Tant remarked, "I always have plenty liquor. Any time you need more, just let me know a day ahead of time and I will have it for you" (R. 87).

2. The government's evidence was furnished by

[2] At that time Jenkins also introduced Frazier and Shew to co-defendant Julian Wesley Goodwin, who proceeded to sell them 18 gallons of non-tax paid whiskey. Goodwin was indicted separately but tried jointly with petitioners for this sale. He was convicted and sentenced to probation for two years (R. 21–25, 203).

agents Frazier and Orsini. Although the informer, Shew, was present in the courtroom, he was not called. Petitioners presented no evidence. Defense counsel's closing argument was directed in large part at the informer. He called the jury's attention to the government's failure to put Shew on the witness stand, and strongly suggested that had Shew been called to testify he would have admitted unlawfully entrapping the defendants into selling the liquor (R. 134–136). The government responded that Shew was equally available to the defense counsel and was not called because his testimony would only have been cumulative (R. 151). Following the court's charge, defense counsel requested a supplementary instruction covering Shew's absence from the witness stand, to the effect that lack of evidence could create a reasonable doubt. The court denied the request (R. 178–190).

## ARGUMENT

Although an instruction that a reasonable doubt can arise from a lack of evidence is not inappropriate, the federal courts have held that failure to give such an instruction is not error where the charge as a whole properly conveys to the jury the concept of reasonable doubt. *Laughlin* v. *United States,* 385 F. 2d 287 (C.A.D.C.), certiorari denied, 390 U.S. 1003; *United States* v. *Meisch,* 370 F. 2d 768 (C.A. 3); *United States* v. *Caruso,* 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862. As the court of appeals for the District of Columbia observed in *Laughlin, supra,* 385 F. 2d at 295:

> * * * in a case where some lack of evidence for the government fairly creates a reasonable

> doubt of guilt, we may expect a normally intelligent jury to perceive that fact after comparison and consideration of all the evidence. * * *

In petitioner's case the reasonable doubt charge given, combined with instructions on presumption of innocence, burden of proof, and consideration of all the facts and circumstances in the case, adequately directed the jury.

Moreover, in light of the evidence adduced at petitioner's trial, there was no basis for an instruction on lack of evidence. The evidence of guilt was ample. All that was missing was the testimony of an informer whom the governmnt declined to call to avoid cumulative testimony, but who was equally available to the defense. His absence from the witness stand benefited petitioners by enabling defense counsel to suggest to the jury that the government had an ulterior and somewhat suspicious reason for not calling him.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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